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IN THE

Supreme Court of the United States

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October Term, 1970

~~No. 1562~~ 70-117

CHARLES JOSEPH KASTIGAR and MICHAEL GOREAN STEWART,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

[redacted]

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

Opinion Below.

The opinion of the Court of Appeals (App. 71-76) is reported at 440 F. 2d 954 (C.A. 9, 1971).

Jurisdiction.

The judgment of the Court of Appeals was entered March 10, 1971 (App. 70). An order of said Court was made and filed on March 30, 1971, staying said judgment pending the filing, consideration and disposition by this Court of a Petition for Writ of Certiorari on condition that said petition be filed on or before April 10, 1971. The Petition was filed April 8, 1971 and was granted May 17, 1971 (App. 77).

The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Question Presented.

Whether a witness can be compelled on pain of imprisonment to testify before a federal grand jury under a federal grant of immunity over his claim of the privilege against self-incrimination secured to him by the Fifth Amendment to the United States Constitution, irrespective of the scope of immunity so conferred, and in any event, where such immunity leaves the witness subject to prosecution for the transaction concerning which he has been required to testify.

Constitutional and Statutory Provisions Involved.

The clauses of the Fifth Amendment to the United States Constitution applicable here, state:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law . . ."

The statutes involved herein are titles II and III of the Organized Crime Control Act of October 15, 1970 which contain a general immunity statute (Title 18, U.S.C. §§ 6001-6005; Pub. L. 91-452, Title II, §201 (a); 84 Stat. 926); and an enforcement section (Title 28, U.S.C. § 1826, Pub. L. 91-453, Title III, §301(a), Oct. 15, 1970, 84 Stat. 932), the pertinent provisions of which are as follows:

18 United States Code—

Part V—Immunity of Witnesses.

* * *

§ 6002. Immunity Generally.

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

"(1) a Court or grand jury of the United States,

"(2) an agency of the United States, or

"(3) either House of Congress, a joint committee of the two houses, or a committee or a sub-committee of either House, and the person presiding over the proceeding communicates to the witness an order under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

§ 6003. Court and Grand Jury Proceedings.

"(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the

request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

"(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

"(1) the testimony or other information from such individual may be necessary to the public interest; and

"(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination."

Title 28, United States Code—

§ 1826. Recalcitrant Witnesses.

"(a) Whenever a witness in any proceeding before or ancillary to any Court or grand jury of the United States refuses without just cause shown to comply with an order of the Court to testify or provide other information, including any book, paper, document, record, recording or other material, the Court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such informa-

tion. No period of such confinement shall exceed the life of—

"(1) The Court proceeding, or

"(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

"(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal."

Statement of the Case.

Petitioners were each summoned to appear and testify before a federal grand jury in Los Angeles, California on February 4, 1971.[1]

Before being examined, petitioners were requested to and did appear, with counsel, in the United States District Court for the Central District of California, Hon. Avery E. Crary, Judge Presiding, whereupon the Assistant United States Attorney presented a written application for an order compelling petitioners to testify under a grant of use-immunity pursuant to Title 18, United States Code, Sections 6002-6003 (App. 54-

[1]Petitioner Kastigar had previously appeared on the same transaction before the grand jury on September 9, 1970, pursuant to subpoena, at which time he declined to testify on grounds of self-incrimination. No immunity was offered at that time, the statute at bar not yet having become operative, and he was excused (App. 60).

56, 58-60). Petitioners, by their counsel, opposed the application on grounds, *inter alia,* that the statutes did not provide immunity co-extensive with the protection afforded by the Fifth Amendment and therefore the proposed order would violate that constitutional provision (App. 5, 8, 15).

The court continued the cause to February 11, 1971, and ordered petitioners to reappear at that time (App. 29).

On February 11, the District Court made and entered a written order under Title 18 U.S.C. §§6002 and 6003 directing each petitioner to "appear forthwith before the grand jury and testify or produce evidence with respect to all matters under inquiry by the grand jury." (App. 55 and 59).

Petitioners were then directed by the court to, and did each appear before the grand jury. Petitioner Kastigar was asked the following question:

> "Q. [By the Assistant U.S. Attorney]: Mr. Kastigar, as we told you before, the grand jury has received a great deal of information concerning a situation in which you had orthodontic braces placed on your teeth just prior to reporting for military induction and had them removed just after a word by a Dr. Bernard Bender, with offices at 8328 DeSoto in Canoga Park.
>
> "Would you tell us, please, how that came about?"

To which question petitioner Kastigar answered as follows:

> "I'm sorry, I decline to say anything about that on the basis that my answer may tend to incriminate me and on the advice of counsel." (App. 48).

In response to another question, petitioner Kastigar stated he would continue invoking the Fifth Amendment privilege against self-incrimination notwithstanding the court's order (App. 48).

Petitioner Stewart was asked the following question before the grand jury:

> "Q. [By Assistant U.S. Attorney]:
> Would you please tell us how it came about that you went to Dr. Bender for the so-called dental services which I described."
>
> To which Stewart replied:
> "Okay, on that I will have to respectfully decline to answer on the ground that it may tend to incriminate me." (App. 48-49).

Petitioner Stewart likewise indicated that he would invoke the Fifth Amendment privilege in response to all further questions (App. 49).

Thereafter, both petitioners arppeared as ordered before said District Court. The grand jury reporter read the afore-described responses of each petitioner. The court then ordered petitioners to answer said question on pain of imprisonment for civil contempt. Each petitioner again refused upon a claim of the privilege against self-incrimination (App. 47-50).

The court thereupon adjudged each petitioner to be in contempt, and ordered them into the custody of the Attorney General until the questions were answered or during the life of the grand jury (App. 49, 50-51).

Upon petitioners' request, that order was stayed until noon, February 16, 1971 (App. 51-52).

On February 12, 1971, petitioners each filed Notice of Appeal from said orders, and a motion for stay of

execution pending disposition thereof on appeal (App. 68-69).

On February 16, 1971, the Court of Appeals for the Ninth Circuit extended the stay pending disposition of petitioners' said motion (App. 65-67) and on February 19, 1971, further extended the stay pending disposition of the appeal in an order which also consolidated petitioners' respective appeals, directed that the appeal be expedited under 18 U.S.C. §1826(b), and provided a briefing and argument schedule which allowed petitioners six (6) days to file their opening brief.

The appeal was argued on March 10, 1971;[2] and later that day, the Court of Appeals rendered its judgment affirming the orders of the District Court adjudging petitioners in civil contempt and ordering them confined (App. 70).

The opinion of the Court of Appeals was filed on March 29, 1971 (App. 71). In it, the Court upholds the federal use-immunity statute at bar as co-extensive with the self-incrimination clause of the Fifth Amendment, relying chiefly on *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, at p. 79 (1964) (App. 74).

Although the statute involved in *Murphy* conferred *transactional* immunity, and was expressly construed to accommodate delicate federal-state relations in the area of crime repression and law enforcement (378 U.S. at p. 79), the Court below read the majority opinion, and the concurring opinion of Mr. Justice White (378 U.S. at pp. 100-107), as approving use-immunity even within a single jurisdiction—the federal system. The Court

[2]Counsel for petitioners was permitted a total of only fifteen minutes in which to present his argument.

below failed to reconcile its conclusion with—or even cite—*Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965), decided one year after *Murphy,* wherein this Court struck down a federal use-immunity statute as incompatible with the Fifth Amendment Privilege.

Petitioners are therefore each adjudged in civil contempt, for refusal to comply with an order of the United States District Court for the Central District of California, made over their respective claims to the Fifth Amendment privilege against self-incrimination, directing each petitioner to answer questions before a federal grand jury inquiring into violations of the Selective Service laws. By reason of said judgment, petitioners have been ordered confined in prison pending compliance with said order. Execution of the judgments below has been stayed by the Court of Appeals below pending the determination and disposition of this Writ.

Summary of Argument.

The legislative history of 18 U.S.C. §§6002-6003 expressly discloses a Congressional intent to substitute "use" for "transactional" immunity.

The question presented is Whether such a statute effectively displaces the protection afforded by the Fifth Amendment privilege.

Implied in that question is the larger one, that is, Whether Congress has the power to enact a law which compels any person to incriminate himself on pain of imprisonment.

Although that question was answered affirmatively in *Brown v. Walker,* 161 U.S. 591 and *Ullman v. United*

States, 350 U.S. 422 (1956), petitioners submit that the rationale of the *Brown* majority has been substantially undermined by subsequent decisions of this and other courts in the Fifth Amendment field, and that it is not consistent with contemporary Constitutional standards. Accordingly, petitioners are asking this Court to review and reconsider *Brown, supra* and like cases, with a view to holding them inconsistent with the commands of the Fifth Amendment Privilege.

Toward this end, petitioners propose to state briefly several reasons why compulsory immunity is believed incompatible with the Fifth Amendment Privilege.

First, we contend that the Fifth Amendment means precisely what it says, that "No person . . . shall be *compelled* to be a witness against himself." (Emphasis supplied). The point made here is that compulsory self-incrimination under an immunity law is irreconcilable with the long line of decisions of this Court holding that forced confessions violate the Amendment Privilege.

As the Solicitor General once wrote:

> "Neither torture nor an oath nor the threat of punishment *such as imprisonment for contempt* should be used to compel him [i.e., the witness] to provide the evidence to accuse *or* to convict himself. If his crime is a serious one, careful and often laborious police work may be required to prove it by other evidence." *Griswold, The Fifth Amendment Today,* Harvard Univ. Press, 1955, at p. 8 (Emphasis supplied).

Second, is petitioners' contention that immunity, like a pardon, cannot be imposed upon an unwilling witness as a means of compelling him to incriminate

himself. Since the privilege is personal to the witness, it can be waived only by him, not by government.

Third, it is shown that no statutory immunity is co-extensive with the Fifth Amendment Privilege without judically diminishing its scope to the detriment of liberty.

Fourth, Petitioners suggest that however laudable may be the purposes of statutory immunity, such objectives cannot be balanced against the right of silence guaranteed by the privilege, except, of course, through the Constitutional Amending process.

However, if immunity from prosecution is deemed still a permissible substitute for the Fifth Amendment Privilege, it is clear that nothing less will do. For manifestly, use-immunity not only falls woefully short of the minimum standards set forth in *Counselman v. Hitchcock,* 142 U.S. 547 and *Brown v. Walker,* 161 U.S. 591, but it is also a menace to constitutional liberty.

In support of that view, petitioners proceed to analyze use-immunity conceptually and as formulated in the statute at bar.

First, petitioners show that the use-immunity provisions here were intentionally adopted by Congress based on some language appearing in *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, at p. 79 (1964), notwithstanding the absence of any opinion reversing *Counselman,* and despite the fact that *Counselman* was re-affirmed by this Court one year later.

Second, petitioners will show that historically, the privilege against self-incrimination was founded on resistence to testimonial compulsion, and its historical

imperatives are irreconcilable with the use-immunity concept.

Third, the statute at bar permits overly broad interrogation power which, in the setting of a grand jury proceeding, endangers not only the witness, but the liberty of all.

Fourth, it is shown that use-immunity, inherently and as implemented by this statute, confers overwhelming and unfair advantages upon the government, thereby exposing the witness to perils proscribed by the Fifth Amendment.

Fifth, on its face and as applied, the use-immunity statute at bar not only suffers but encourages the abuse of overly broad interrogation power by removing from the courts the power to control or interfere with it.

Sixth, petitioners point out that use-immunity is, illusory at best, even though government may have the burden of proving its evidence against an immunized witness was independently acquired.

Seventh, petitioners attempt to demonstrate that use-immunity cannot be co-extensive with the Privilege because dependent for its implementation on rules which, in effect, will expose an immunized witness to conviction based on testimony from his own mouth.

Eighth, and last, petitioners synopsize the issue with the question, why use-immunity? And with the conclusion, that the unfairness and abuse inherent in use-immunity requires the government to choose between getting desired testimony *or* prosecuting. To give the government both options deprives petitioners of rights guaranteed by the Fifth Amendment.

ARGUMENT.

I.

The Fifth Amendment Privilege Against Self Incrimination Denies Government the Power to Compel Any Person to Incriminate Himself Involuntarily, Even Though Granting Him Immunity From Prosecution for Transactions to Which His Testimony Relates; and Therefore Precedent to the Contrary Should Be Reconsidered.

Before discussing the use-immunity statute at bar, petitioners believe this Court should re-examine the policies and rationale which have heretofore sustained immunity statutes as such. Accordingly, petitioners will try to show that in its application and reason, statutory immunity is utterly incompatible with the historic dimensions and imperatives of the Fifth Amendment Privilege, as construed and applied by this Court; and that to compel a witness to testify involuntarily contravenes the plain command of that Amendment.

1. Compulsory Self-Incrimination Under a Grant of Immunity Is Incompatible With Decisions of This Court Condemning Such Process as Violative of the Fifth Amendment.

This Court has repeatedly noted that one of the principal policies underlying the Privilege is "the inviolability of the human personality" and that—

> "Our accusatory system of criminal justice demands that the Government seeking to punish an individual produce the evidence against him by its own independent labors rather than by the cruel, simple expedient of compelling it from his own mouth."

Miranda v. Arizona, 384 U.S. 436, at p. 460 (1965);

Chambers v. Florida, 309 U.S. 227, 235-238 (1940).

It has always been deemed essential that the Privilege be construed liberally, that is, to effectuate its purposes and efficacy. *Spevac v. Klein,* 385 U.S. 511, 515-516 (1967); *Albertson v. Subversive Activities Control Board,* 382 U.S. 70, 81 (1965) (*holding use-immunity statute unconstitutional*); *Miranda v. Arizona, supra,* 384 U.S. at p. 461; *Boyd v. United States,* 116 U.S. 616, 635 (1884). As Mr. Justice Frankfurter suggests in *Ullman v. United States, supra,* 350 U.S. at p. 439:

> "This Constitutional Privilege must not be interpreted in a hostile or niggardly spirit."

Yet, the *Brown*[3] and *Ullman* courts declined to read the Fifth Amendment Privilege as guarding against the evils of compulsory self-incrimination, even though such construction would seem to be the one suitable to its history, and the interpretation most likely to effectuate the purpose which its framers and ratifiers intended—the preservation of individual dignity (See: *Miranda v. Arizona,* 384 U.S. 436, 460 (1965)).

If the history which wrought the Privilege is thought too remote, surely the McCarthy epoch, so recently upon us, revived the lessons of the Star Chamber: that the broader the scope of the power to inquire, the greater the inducement to exercise it fully and oppressively; and correlatively, the greater the pressure upon the suspect to impart to his protagonists not only what he knows, but what he believes they want to hear. (See: *e.g. Communist Party v. Subversive Activities Control Board,* 351 U.S. 115 (1956); *Mesarosh v. United States,* 352 U.S. 1 (1956) *Flynn v. United States,* 130 F. Supp. 412 (S.D.N.Y., 1955)).

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[3]*Brown v. Walker,* 161 U.S. 591, 600, 605-606 (1896).

From his own historical analyses of the Privilege, Wigmore concluded:[4]

> ". . . Any system of administration which permits the prosecution to trust habitually to compulsory self disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and to torture. If there is a right to an answer, there soon seems to be a right to the expected answer —that is, to confession of guilt. Thus, the legitimate use grows into the unjust abuse . . . Such seems to have been the course of experience in those legal systems where the privilege was not recognized."

Since *Bram v. United States,* 168 U.S. 532, 547 (1897), this Court has consistently condemned compulsory incrimination as incompatible with the Privilege, regardless of the mode or source of the coercion. (*Compare: Brown v. Mississippi,* 297 U.S. 278 (1936) (*physical beating*); *Chambers v. Florida,* 309 U.S. 227 (1940) (*physical and mental pressure*); *Watts v. Indiana,* 338 U.S. 49 (1949) (*Protracted interrogation*); *Spano v. New York,* 360 U.S. 315 (1959). (*False sympathy, coupled with denial of counsel*); *McNabb v. United States,* 308 U.S. 332 (1943); (*pro-*

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[4]*Wigmore, on Evidence,* 3d Ed., McNaughton Rev. Ed., 1961, at p. 296, n. 1.

longed interrogation); *Blackburn v. Alabama,* 361 U.S. 199 (1960) (*Psychological pressure*); *Miranda v. Arizona, supra,* 384 U.S. 436 (1967) (*denial of counsel*) *Semble: Moore v. Michigan,* 355 U.S. 155 (1957) (*Guilty plea out of fear of mob violence*) with *Garrity v. New Jersey,* 385 U.S. 493 (1967) (*threat of loss of employment*) and *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965) (*fear of prosecution*)).

Invariably, the test applied to such cases is whether the suspect has been deprived of his "free choice to admit, to deny, or to refuse to answer" (*Lisenba v. California,* 314 U.S. 219, 241 (1941)). In *Garrity v. New Jersey, supra,* it was held that the option between loss of employment and self-incrimination was "the antithesis of free choice to speak out or remain silent." (385 U.S. at p. 496).

Here, of course,—as in *Udall's* case,[5] the alternative is not simply loss of job, but jail!

While imprisonment for civil contempt is perhaps a milder form of compulsion than the rack and the screw, or *peine forte et dure,* its continued employment after several centuries as a device for compelling testimony attests to its persuasiveness.

> "It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self accusation, falling upon the innocent as well as the guilty, would be cruel and unjust; and it would seem the search for evidence is disallowed upon the same principle." Lord Camden, in *Entick v. Covington,* 19 Howell St. Tr. 1029, as quoted in *Boyd v. United States, supra,* 116 U.S. 616 at p. 629 (1886).

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[5]See page 29 *infra.*

True, the Court is not asked to reverse a conviction resting on a coerced confession, but to bar the process by which such tainted evidence is obtained. Yet, the principles and objectives are the same—that is, preservation of individual dignity and judicial integrity (*Elkins v. United States,* 364 U.S. 206 (1960); *Mapp v. Ohio,* 367 U.S. 643, 660 (1961); *McNabb v. United States,* 308 U.S. 332, 345).

> "Fastidious regard for the honor of the administration of justice requires the Court to make certain the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be made." *Communist Party v. Subversive Activities Control Board, supra,* 351 U.S. 115, at p. 124.

Plainly, a conviction resting on a confession or admission secured by threatening to imprison the accused until he implicates himself would offend the Fifth Amendment Privilege. The illegality of such a method is not cured merely because Congress has inserted it into a use-immunity statute. Nor can such methods be tolerated by the courts "without making . . . themselves accomplices in willful disobedience of law". (*McNabb v. United States, supra,* 308 U.S. at p. 345).

> "Out of regard for its own dignity as an agency of justice and custodian of liberty, the Court should not have a hand in such 'dirty business'." (*People v. Cahan,* 44 Cal. 2d 434, 282 P. 2d 905 (1955), quoting *Holmes, J., dissenting in Olmstead v. United States,* 277 U.S. 438, 470 (1928)).

2. Immunity, Like Pardons, Cannot Be Thrust Upon an Unwilling Witness as a Means of Compelling Him to Incriminate Himself.

In any event, it is submitted that immunity, like a pardon, may only be conferred upon a witness with his consent. The notion that Government may suspend or withhold a citizen's constitutional rights at its own pleasure seems noxious to the very purpose of the Bill of Rights.

Brown v. Walker, supra, relying on several English pardon cases (161 U.S. at p. 599) held that transactional immunity operates "as a complete pardon for the offense to which it relates", and therefore satisfies the demands of the Privilege (161 U.S. at p. 595).[6]

The *Brown* Court equated statutory immunity with general amnesty, and observed that "the distinction between amnesty and pardon is of no practical consequence . . ." (161 U.S. at p. 601).

Now, in *Burdick v. United States,* 236 U.S. 79 (1915), relying on *United States v. Wilson,* 32 U.S. (7 Peters) 150, 160-161 (1833), this Court upheld the right of a witness to refuse a pardon because carrying with it an implicit admission of guilt.

It would seem to follow, albeit for different reasons, that if a witness may decline a pardon which, upon acceptance, would have displaced the Privilege, a witness may likewise refuse immunity.

Thus, the Privilege has been held to be a personal right of the claimant which only he can waive. (*Compare: Boykin v. Alabama,* 395 U.S. 238, 243-244 (1969); *Semble; Brookhart v. Janis,* 384 U.S. 1

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[6]"When the reason for the Privilege falls, the Privilege falls." *Ullman v. United States, supra,* 350 U.S. at p. 439.

(1966) (Waiver by attorney not imputable to defendant)).

In *Afroyim v. Rusk*, 387 U.S. 253 (1967), a majority of this Court held that the right of citizenship, expressly conferred on the citizen by the Constitution, could not be revoked or abrogated by the government without his consent (*Semble: Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)). So here, the Fifth Amendment Privilege ought not to be withheld from petitioners by mere legislative fiat, particularly where involuntary disclosure under statutory immunity leaves their liberty and status in greater jeopardy than it was when their right to remain silent was secured by the Fifth.

3. It Has Been Necessary to Judicially Contract the Dimensions of the Fifth Amendment Privilege in Order to Render Statutory Immunity Co-Extensive Therewith. Resulting in a Concomitant Loss of Liberty.

Furthermore, experience with transactional immunity demonstrates that even *its* breadth does not provide the witness protection co-extensive with the Fifth Amendment Privilege. The reason is clear: While acknowledging the *Counselman* mandate, courts have sometimes found it necessary to satisfy it by reducing the scope of the Fifth to fit the contours of the statutory immunity problem presented.

Thus, the *Brown* court refused to recognize infamy within the scope of the Privilege, stating that the impairment of a witness's good name as an incident of statutory immunity "is a penalty which it is reasonable he should be compelled to pay for the common good" (*Brown v. Walker, supra*, 161 U.S. at p. 606).

This view, long since rejected by this Court (See *Quinn v. United States, supra*, 349 U.S. at p. 164;

Ullman v. United States, supra, 350 U.S. at p. 426), was replaced in *Ullman* by the contention that the privilege protected only against exposure to a criminal charge (350 U.S. at p. 431). However, as Professor Mitchell Franklin conclusively demonstrates, in America and in the Old World the privilege against self-incrimination historically embraced also a privilege against self-infamy (Franklin, *The Encyclopédiste Origin of the Fifth Amendment,* 15 Lawyers Guild Review, 41 (*et seq.*) at p. 53 (1955); Franklin, *Infamy and Constitutional Civil Liberties,* 14 Lawyers Guild Review, 1-10 (1954)). The Fifth Amendment Privilege would therefore seem to extend its protection to loss of employment, reputation and other non-penal incidents of exposure. (*Cf. Garrity v. New Jersey, supra,* 385 U.S. 493; See also: *Quinn v. United States, supra,* 349 U.S. 155, 163-164 (acknowledging "the popular opprobrium which often attaches to exercise of the Privilege")). Indeed, isn't the tort of Invasion of Privacy constructed on notions which recognize the interest of the individual in suppression of his past mistakes?

Similarly, it has been held that the Privilege does not extend to protection beyond the claimant's own person (*Brown v. Walker, supra,* 161 U.S. at pp. 609-610). Yet, that view finds no support in the historical usage of the Fifth either. Udall expressly invoked the Privilege to avoid disclosure of the true author of the Martin Marprelate books.[7] Indeed, as Wigmore and Chafee recognized, the Privilege and other procedural rights were—and still are—frequently invoked by no-

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[7]*Chafee,* the Blessings of Liberty, Lippincott Press, 1956, at pp. 193-194 (quoting from 1 *Howe State Trials,* 1271 *et seq.*).

litical dissenters who believed their cause just and the offended law to be iniquitious.[8]

So too, Dean Griswold notes that the Privilege is often invoked out of loyalty to friends and associates whose conduct the witness sincerely believes to be as innocent as was his own.[9]

Moreover, it is doubtful that the suggestion advanced by Mr. Justice Brown that "every good citizen is bound to aid in the enforcement of the law", (*Brown v. Walker,* 161 U.S. at p. 600) in the context of political activity or employment, is either realistic or morally sound. It is more accurate to say that compulsory immunity statutes repress courage and incite cowardice and self-interest.[10] It is also more realistic to address that suggestion to those not accused of offending the law (See: *Miranda v. Arizona, supra,* 384 U.S. 436, at p. 461).

Indeed, the statute here, through the contempt power, lends itself to the punishment of those whom legislation could not otherwise reach—*e.g.,* political dissenters who refuse to disclose the names of their associates (Compare: *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 462 (1958); *Shelton v. Tucker,* 364 U.S. 479, 485-487 (1960) with *Yates v. United States,* 355 U.S. 66 (1957); *Semble: Talley v. California,* 362 U.S. 60 (1961)).

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[8]Wigmore, *op. cit.*, pp. 313-314; Chafee, *ibid.*, at p. 207.

[9]*Griswold, The Fifth Amendment Today,* Harvard Univ. Press, 1955, at p. 16.

[10]Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion,* 10 Saint Louis U.L.J. 327 at p. 372 (1965).

4. The Right of Silence Guaranteed by the Fifth Amendment Should Not Be Re-Weighed Against a Congressional Objective, However Laudable, Save by the Amending Process Prescribed in the Constitution.

Although the Fifth Amendment Privilege confers absolute immunity, and demands that any substitute proffer equivalent protection (*Counselman v. Hitchcock, supra,* 142 U.S. at p. 586; *Albertson v. Subversive Activities Control Board, supra,* 382 U.S. at pp. 80, 81)), the law tends to be intolerant of absolute rights, at least when they are inconvenient to a legislative purpose deemed more compelling. Of course, mere expediency does not justify the abrogation of contitutional rights (*Johnson v. United States,* 333 U.S. 10, 15 (1948); *Mapp v. Ohio,* 367 U.S. 643, 658 (1961)). The Bill of Rights was not adopted as a convenience to the government, but as a deterrent to the historical and current propensity of government to transgress on the liberties of its citizens.

Therefore, the intimation in *Brown, supra* (161 U.S. at pp. 596, 600) that the policies underlying the Privilege may be so construed as to bring them in harmony with the legislative purpose of immunity—that is, the unobstructed furtherance of the administration of criminal justice—seems utterly irreconcilable with the purpose of the Bill of Rights.

Balancing of interests may be appropriate in some constitutional areas, as where two competing constitutional rights are at stake (*e.g.* free press v. fair trial: *Craig v. Harney,* 331 U.S. 367 (1947); *Bridges v. California,* 314 U.S. 252 (1941)).

But to balance constitutionally protected liberties against a legislative objective, however laudable the

latter may be, would soon reduce the Constitution to mere rhetoric. It follows that to favor a current and doubtlessly compelling state interest by simply disregarding interests which a constitutional amendment was originally enacted to protect accomplishes the same undesirable result.

As Mr. Justice Frankfurter reminds us in *Ullman, supra,* 350 U.S. at p. 427:

> "The founders of the nation were not naive or disregardful of the interests of justice."

But in framing and ratifying the Fifth Amendment, they struck a balance in favor of protecting the personal dignity and security of the individual (see: *Miranda v. Arizona, supra,* 384 U.S. at p. 460; Griswold, *ibid.* (n. 9, *supra*), at 7).

> "This guarantee against testimonial compulsion, like other provisions of the Bill of Rights 'was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed' Feldman v. United States (1944) 332 U.S. 487, 489." (*Hoffman v. United States,* 341 U.S. 479, 486 (1951)).

And there the balancing should end, unless and until the Privilege is amended by Constitutional means.

Even the *Brown* approach to Constitutional interpretation should require some showing—beyond that of obvious inconvenience—that the exercise of the Privilege is causally linked to a rising crime rate and government's inability to cope therewith, even with the tools legally available.

It is simply assumed by the immunity cases that the Right of Silence is an obstacle to effective law enforcement. But scientific and technological advances, the informer system, together with a limited right to conduct electronic surveillance *Katz v. United States,* 389 U.S. 347, 355-356 (1967), have equipped police with powerful (and frightening) weapons in the "war on crime". With such devices at their disposal, the Privilege would appear to be even more critical to the preservation of human liberty and dignity.

In the final analysis, the reasons for, and the benefit to justice and a democratic society accruing from enforcement of the plain words of the Fifth Amendment Privilege seem to warrant a reconsideration of a concept so at war with its historical imperative and tradition, namely, that any person can be forced to tell government what it wants to know—and hear.

II.

Use-Immunity Is Unable to Afford Protection to a Witness Co-Extensive With His Fifth Amendment Privilege, and Therefore §§6002-6003, on Their Face and as Construed and Applied Not Only Contravene the Self-Incrimination and Due Process Clauses of the Fifth Amendment, but They Also Pose a Substantial Threat to Civil Liberty.

1. Although Transaction Immunity Has Never Been Repudiated by This Court, While Use-Immunity Has Been, It Is Clear That Congress Intended to Substitute Use for Transaction Immunity.

In *Counselman v. Hitchcock,* 142 U.S. 547 (1892), this Court declared unconstitutional a federal use-immunity statute which compelled a witness to incriminate himself, while enjoining use of his testimony "in any criminal proceeding or for the enforcement of any penalty, fine or forfeiture."

Although the court found objectionable in that statute its failure to preclude also the use of the *fruits* of the compelled testimony (142 U.S. at p. 564), the thrust of its holding is upon other grounds, namely that—

> "No statute which leaves the party or witness subject to prosecution after he answers the incriminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States. [The immunity statute] does not supply a complete protection from *all* the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment to be valid *must afford absolute immunity against future prosecution for the offense to which it relates.*" (*Emphasis supplied*) (142 U.S. at pp. 585-586).

That principle has prevailed ever since as the standard for all federal immunity statutes. (See: *Albertson v. Subversive Activities Control Board,* 382 U.S. 70, 80 (1965); *Ullman v. United States,* 350 U.S. 422 (1956); *Brown v. Walker, supra,* 161 U.S. 591); and was so accepted by Congress until the decision of this Court in *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52 (1964). There, the majority concluded that incriminating testimony, or its fruits, obtained under the compulsory immunity statute of one jurisdiction could not be used in another.

In reaching this result, Mr. Justice Goldberg stated:

> "That in order to accommodate the interests of the state and federal governments in investigating

and prosecuting crime, the federal government must be prohibited from making any such use of compelled testimony and its fruits."

In footnote 18, p. 79, the Court observed that this policy was enforceable by means of the tainted evidence rules applicable to coerced confessions and other illegally obtained evidence.

In thus overruling *Knapp v. Schweitzer,* 357 U.S. 371 (1958), *Feldman v. United States,* 322 U.S. 487 (1944), and like authority for the contrary rule, the holding actually extended the dimensions of immunity nearer the peripheries of the Privilege. Far from overruling *Counselman v. Hitchcock, supra,* the majority invoked its language for support.

Ignoring the context of the "use and fruits" language, however, Congress seized upon it as expressing approval of use-immunity. The provisions at bar were incorporated into an omnibus anti-crime bill, euphemistically termed the "Organization Crime Control Act of 1970,"[11] and enacted on October 15, 1970 is substantially the same form as when introduced.[12]

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[11]Obviously, from the record in this case, its application is not limited to Organized Crime.

[12]That Title II was intended to confer "use" rather than "transaction" immunity is made abundantly clear by its legislative history. The Report of the House Judiciary Committee which accompanied the provisions at Bar through both Houses, expressly recites that Title II "will afford 'use' immunity rather than 'transaction' immunity," (U.S. Cong. Code & Adm. News, 91st Cong., 2nd Sess., No. 12, Nov. 20, 1970, at p. 4706).

The Committee's analysis of Title II adds that: "It is designed to reflect the use-immunity concept of *Murphy* [cite omitted here] rather than the transaction concept of *Counselman v. Hitchcock* [cite omitted here] (*Report, ibid.,* at p. 4716).

Finally, most, if not all, existing transaction immunity statutes were either repealed or converted into use-immunity language. (See, *e.g.* 18 U.S.C. 2424, Pub. L. 91-452, Title II, §226; 84 Stat. 930).

Federal Courts in at least two other jurisdictions have disagreed with the Court of Appeals below, concluding after extensive analysis of the authorities, that *Counselman v. Hitchcock, supra,* had not been reversed, and that the statute at bar was in conflict with its mandate that no immunity statute is valid unless the witness compelled to incriminate himself is protected from subsequent prosecution for the transaction about which he testified. (*In the Matter of Jack Korman and Robert W. Likas,* No. 71-1328, 7th Circuit, decided May 20, 1971, petition for cert. pending; *In Re Grand Jury Testimony of Joanne Kinoy,* 326 F. Supp. 407 (S.D. N.Y., 1971)).

2. The Historical Development of the Privilege Was Founded on Resistance to Testimonial Compulsion and Is Utterly Incompatible With the Use Immunity Concept.

The origins of the Fifth Amendment Privilege—as its language intimates—are steeped in the blood and agony of men put to inquisitional oaths and torture to compel self-accusation and other information sought by the State.

Compulsory incrimination in England can be traced to the Thirteenth Century when the Constitution of Otho adopted the general oath of calumny for clergy, providing that one could not deny under questioning what he knew to be true.[18]

Such oaths were administered only after presentment, but during the struggle between the Crown and the Church involving jurisdiction over such procedure,

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[18]8 Wigmore, Evidence, 3d Ed., McNaughton Rev., 1961, §2250, at p. 270. Some years later, the oath was extended to laymen who were compelled to answer truly. Failure to take the oath or answer under it was taken as a confession for which the party suffered excommunication. *Id.*, pp. 271, 273-274.

the ex-officio oath emerged as the State mechanism for investigating and suppressing heresy and other crimes.[14] The latter oath did not require accusation, but served the function of bringing testimony from a suspect upon which an indictment could be based.[15] Since an indictment was a prerequisite to prosecution, (although not in Udall's case)[16] the accused was required to plead thereto. If he refused, *peine forte et dure* was applied, a form of torture whereby heavy stones were placed upon his body until he plead or died.[17]

His plea was usually a confession that the accusation was true, for being still under oath, he dared not deny what his previous answers had produced.

Resistance to the oath developed slowly. By the end of the 16th Century, as Udall's case reveals, the right against compulsory self-accusation had been established in English common law courts in capital cases.[18]

It is appropriate to this case to pay a moment's respect to Udall's inquisition. A Puritan clergyman, Udall was summoned by the High Commission to answer questions concerning the Martin Marprelate books. He had not written them, but he knew who did, and he had used the same secret press to publish two anonymous tracts critical of the Anglican Bishops.[19]

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[14]*Ibid.*, pp. 273-276.

[15]Wigmore, *id.*, p. 276.

[16]*Chafee, The Blessings of Liberty,* 1st Ed., 1956, at p. 195.

[17]E. M. Morgan, *The Privilege Against Self-Incrimination,* 1949 Minn. L. R. 1, at pp. 5-10.

[18]*Ibid.*, p. 193; also, N. 32, p. 340.

"Udall: 'To swear to accuse myself *and others*, I think you have no law for it.

"Lord Anderson: 'That is true, if it concerned the loss of your life." (1 Howe St. Tr.)

[19]Chafee, *ibid.*, p. 193.

After Udall had refused for the better part of a day to identify the author, or "to be mine own tormentor", the Bishop of Rochester exclaimed:

> "Then you must go to prison, and it will go hard with you, for you must remain there until you be glad to take it."[20]

Udall was imprisoned, for six months, virtually incommunicado, until put to trial and convicted.[21]

Under the Stuarts, the ex-officio oath was transferred to the Star Chamber which had long been empowered to try most criminal offenses and impose any punishment, save death. It enforced the oath with great cruelty and arrogance.[22] Thus, in the case of Edward Peacham, a Puritan clergyman accused of High Treason, Bacon, the Attorney General, reports—

> "Upon these interrogatories, Peacham was examined before torture, between torture and after torture; nothing could be drawn from him, he still persisting in his obstinate and inexcusable denials and former answers."[23]

When Lilburn refused to incriminate himself before his inquisitors, he was ordered whipped and pilloried for refusing to take the oath "without which many offenses might go undiscovered and unpunished".

He was subsequently pardoned and awarded damages by Parliament on the ground that " 'the *sentence*

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[20]Chafee, *ibid.*, p. 194.

[21]Chafee, *ibid.*, p. 195.

[22]Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 Mich. L. R. 1, at p. 5. Chafee, *ibid.*, pp. 191-192; *Wigmore, op. cit.*, p. 281; Morgan, *op. cit.*, at pp. 5-6.

[23]Corwin, *op. cit.*, at p. 5.

was illegal and against the liberty of the subject' ".[24] (*Emphasis supplied*).

Although maintaining that he was not "bound to answer such [questions] as to do not belong to me", Lilburn did concede that he could be compelled to answer at trial.[25] Even so, by the time James II was deposed, the privilege had become so firmly established that it was thought unnecessary, or perhaps subversive of the principle to incorporate it in William's Bill of Rights.[26]

As testimonial compulsion was abolished in England, it became codified in France, and remained an instrument of oppression there until its abolition in 1789.[27]

These events were, of course, well known to the Constitutional framers, not only because their ancestors had fled inquisition, but because inquisitional practices were brought with them.

The Puritans, for example, who had been forced to take the odious oaths of supremacy and allegiance as a condition of departing for America, enacted in 1641 the Body of Liberties which, though prohibiting torture and oaths as a means of compelling self-accusation, permitted "tortures as [were not] barbarous and inhuman" after conviction until 1650, when all torture was finally abolished.[28]

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[24]Wigmore, *op. cit.*, at pp. 283-287; Chafee, *op. cit.*, pp. 203-205.

[25]Wigmore, *op. cit.*, at pp. 285-287.

[26]Wigmore, *op. cit.*, at pp. 288-289, 292.

[27]Wigmore, *ibid.*, pp. 290-293.

[28]Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. L. R. 763 (1935), at pp. 772-776; *Chafee, op. cit.* p. 188.

Following, and partly because of Bacon's Rebellion in 1677, Virginia banned compulsory self-incrimination.[29]

Even so, the device of contempt and imprisonment continued to be used by the Prerogative and other High Colonial courts to enforce hated trade laws in the colonies.

But by the American Revolution, torture had been uniformly abolished by the Colonial states.[30]

In the debates on the Federal Constitution, the few references to the Privilege against self-incrimination were invariably couched as a privilege against torture. So, in 1788, Patrick Henry opposed ratification of the Constitution, because it failed to proscribe torture, arguing, "But Congress may introduce the practice of torturing to extort a confession of the crime." Chafee suggests that "the desire to quiet such objections was one reason for putting the clause against self-incrimination into the Bill of Rights".[31]

3. Use-Immunity Endangers Liberty, Particularly in the Inquisitional Setting of a Grand Jury Proceeding Because Permitting Overly Broad Interrogation Power.

A principal, if not exclusive object of any immunity statute is governmental convenience in suppressing crime. It is to get at desired information more quickly and easily than by conventional methods.

Use-immunity services this objective most efficiently. Because he witness remains subject to prosecution for the transactions to which his testimony relates, use-

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[29]Pittman, *ibid.*, pp. 777-779.
[30]Pittman, *op. cit.*, 787-788.
[31]Pittman, *ibid.*, p. 788; Chafee, *op. cit.*, p. 188.

immunity thus broadens the compulsory immunity power while reducing the risk in obtaining information thereby.

The less the risk in securing information, the greater the pressure becomes to acquire all information by such methods.

To avoid jail and prosecution, a witness may not only tell what he knows, but what he believes his inquisitors want to hear (*cf. Flynn v. United States,* 130 F. Supp. 412 (S.D.N.Y., 1955)).

Under the use-immunity statute here there are no limits on government's investigative power, save the prosecutor's conscience and the grand jury's patience. He is unleased by the Act to roam at will across the gamut of the witness's defenses, opinions and any other subject that suits him.

It is difficult to see how this statutory scheme can be thought to be compatible with the Fifth Amendment Privilege where it invites revival of the inquisitorial system which gave rise to the Privilege, and whose mischief it was designed to prevent (*Counselman v. Hitchcock, supra,* 142 U.S. at p. 562).

4. Use-Immunity Furnishes the Government With a Sweeping Pre-Trial Discovery Tool Which Exposes the Witness to Dangers Prohibited by the Fifth Amendment and Which Use-Immunity Cannot Effectively Displace.

It follows from the broad interrogation power conferred by this use-immunity statute that as it bestows great benefits upon government, unlike transaction immunity, it enlarges to that extent the peril of the witness. It hardly need be added that such result not only denies protection co-extensive with the Fifth Amend-

ment Privilege, but contradicts even the stated purpose and effect of the use-immunity statute at bar. Thus, under this statute, the government is at liberty to conduct a free-wheeling discovery of the witness's defenses, exploring for its weaknesses and its hopes (*i.e.*, witnesses), although the witness has no such corresponding right, even at trial. (See: Jenks Act, 8 U.S.C. §3500; Rule 16, *Rules of Criminal Procedure*).

The proceedings being secret, the immunized witness has neither his counsel—nor the Court—to protect him from a relentless, overbearing interrogation (*cf. Berger v. United States*, 1934, 295 U.S. 78).

The witness is probably unprepared, especially if not informed of the subject matter of the inquiry. Likely too, he is unfamiliar with either law or court rooms, and is apprehensive concerning his fate. In sum, he may be "badly frightened" and "lost in fear and confusion"[32] and in the end, give contradictory and mistaken answers. As a result, he may fear to take the witness stand in his own defense lest he be subsequently prosecuted for perjury.

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[32]Dean Erwin Griswold, *The Fifth Amendment Today*, Harvard Univ. Press, 1955, at p. 20, explaining why such a witness "might turn to the privilege as a means of sanctuary from the situation which he feels himself incompetent to handle".

See also: *Wilson v. United States*, 149 U.S. 60, 66 (1893), wherein this Court observed:

> "It is not everyone who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing other and attempting to explain transactions of a suspicious charater, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not everyone, however honest, who would, therefore, willingly be placed on the witness stand."

This possibility may have been anticipated by the prosecutor as it was by the Ninth Circuit Court in *Groshart v. United States,* (9th Cir., 1968) 392 F. 2d 172, at p. 180, when it noted:

> "Surely, too, we should not encourage law enforcement officers to interrogate one in violation of his constitutional rights with the sole purpose of obtaining evidence for use in impeaching him should he testify at a future trial or for the purpose of thereby preventing a defendant from taking the stand in his own defense."[33]

5. The Use-Immunity Statute at Bar, on Its Face and as Applied, Not Only Permits, but Encourages Abuse of Its Overly Broad Interrogation Power by Withdrawing From the Courts the Power to Control or Interfere With Its Exercise.

However, it is not only the possibility of a perjury prosecution which warrants the protection of the Privilege; it is also the unchecked investigative power which the use-immunity permits and the statute here encourages. The friendless, inquisitorial atmosphere of the grand jury room in which the witness is compelled to speak is akin to the "isolated setting of a police station" (*Miranda v. Arizona, supra,* 38 U.S. 436, 461),

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[33]The factual setting of this case should not be overlooked. Petitioners were summoned by a grand jury and there ordered to admit violations of the Selective Service laws or go to jail.

From the questions asked, a reasonable inference can be drawn that the prosecution already possessed independently acquired evidence—perhaps all that was needed for conviction, except *intent.*

A vigorous cross-examination of petitioners might well have cemented them into positions which subsequent recollection revealed to be erroneous. Yet, the prosecutor could enter the trial with some confidence that the petitioners would retain their prior testimony or stay off the witness stand.

and to the star chambers of a one-man-one-judge grand jury (*In re Oliver*, 333 U.S. 257 (1948); *In re Murchison*, 349 U.S. 133 (1955)). While the form of due process is here maintained, the statute at bar withholds its substance, leaving the immunized witness as unprotected from abusive, irrelevant and unconstitutional interrogation as was the accused in *Oliver*, *Murchison* and *Miranda*.

§6003 of the Act at bar *requires* the United States District Court to issue an order compelling a witness to incriminate himself under the use immunity provisions of §6002 upon a showing by the United States Attorney that 1) he deems the witness's testimony to be necessary to the public interest; 2) the witness has invoked his Fifth Amendment Privilege, or is likely to do so; and 3) the Attorney General, or a designated subordinate, has approved of it.

The Prosecutor is not compelled by the statute to disclose a *reasonable*, or any other basis for his belief that the witness's testimony is in the public interest. Thus, neither the witness nor the Court may know in advance of the investigation whether the basis for intruding upon the witness's privacy, and searching out his past and present activities for criminal offenses, meets the standards of the Fourth and Fifth Amendments. (Compare: *Marcus v. Search Warrants of Property*, 367 U.S. 717 (1961); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Boyd v. United States*, 116 U.S. 616 (1886).)

Nor does the statute, either on its face or as applied, compel the United States Attorney to show even the *subject matter* of his investigation, so that the witness—and ultimately, the Court—may determine the

scope of the inquiry, and hence, the relevancy of the questions put to him.

Indeed, the limited showing required by §6003(b) was, in the District Court below, set forth in conclusionary form, in substantially the language of that section. The Government contended that no more was required (App. 17-18).[34] Over the defense objections just stated (*inter alia*)[35] the Court, with some hesitancy (App. 38-39), signed the compulsory immunity order (App. 42, 57, 61).

The House Committee Report on Title II (H.R. No. 91-1188, 91st Cong. 2d Sess., 6/15/70 [Accompanying H.R. 11157] states (at p. 13)):

> "The Court's role in granting the [compulsory immunity] order is merely to find the facts on which the order is predicated. The statutory scheme is 'shall'. *Review that second judges prosecutive* discretion is not authorized. Compare *In re Bart*, 304 F. 2d 631 1962)." (***Emphasis supplied***).

In citing *Bart, supra,* it is clear that the statutory framers intended to overrule it. For *In re Bart, supra,* held a government application made under the old immunity statute to be deficient because failing to show factually the relevancy of the grand jury's investigation to the national security which, under that statute, was requisite for granting immunity (*In re Bart, supra,* 30 F. 2d at p. 636).

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[34]"Now, Mr. Manes says the statute makes this court ministerial in its function . . . The statute makes it very plain that the court's function *is* ministerial. The court is not informed and cannot be so informed as the grand jury or the U.S. Attorney . . . and the court simply doesn't have that responsibility nor the time." (App. 17-18).

[35]See: App. 9-10, 15-16.

The restraint of relevancy is usually available to deter misuse of investigative power (*Compare: Watkins v. United States,* 354 U.S. 178, 205-206 (1957); *Russell v. United States,* 369 U.S. 749 (1962); *In re McElrath,* 248 F. 2d 612 (1957)).

But relevancy as a ground for limiting inquiry to particular transaction for which immunity was authorized seems to have been extirpated from the statute at bar. For under this statute, use-immunity may apparently be conferred for *any* transaction or matter; and the judicial power to restrain an overly broad investigation which was permitted before a finding of contempt had been made (*See: Cobbledick v. United States,* 309 U.S. 323, 328 (1940); *In re McElrath, supra,* 248 F. 2d at p. 616; *In re Bart, supra,* 304 F. 2d at p. 637), appears to have become impertinent even in a contempt proceeding. Thus does this statute transgress even upon the judicial function.[86]

6. The Immunity Afforded the Statute at Bar Is Illusory Notwithstanding That Government May Have the Burden of Proving Its Evidence Against an Immunized Witness Was Independently Acquired.

While it is true that in the prosecution of a use-immunity witness for a transaction to which his testimony relates the Government probably has the burden of proving that its evidence has been independently acquired (*Murphy v. Waterfront Commission of New York, supra,* 378 U.S. at p. 79 N. 18), the protection of such a rule is largely illusory.

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[86]See: Rogge, *New Federal Immunity Act and the Judicial Function,* 45 Cal. L. R. 109, 133 (1957).

As Congressman William F. Ryan of New York points out in his minority opinion to the House Judiciary Committee's Report:[37]

> "It is not difficult to mask evidence so that it appears to have been developed independently of the immunized witness's testimony or information."

Information extracted from the accused in the grand jury room is easily implanted by an investigator in the mind of a prosecution witness as independent recollection, or may furnish leads to a site or event at which independent witnesses or evidence may be found.

How, indeed, does even a conscientious prosecutor or law enforcement officer, upon exposure to compelled testimony, once removed, know or recall with accuracy the point at which his allegedly independent evidence has become tainted? And consider the obvious possibility, suggested somewhat by the record in *DeLorenzo v. United States,* 151 F. 2d 122 (C. A. 2, 1945), where information from the lips of the accused, though already known to, but not understood by the prosecutor, supplies the key which makes it comprehensible and prosecution possible.

Thus, notwithstanding a prosecutor's honest motive and good faith, use-immunity may leave the witness "much worse off in regard to the danger of prosecution and conviction than if he had remained silent".[38]

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[37]H.R. Report No. 91-1188, 91st Cong., 2nd Sess., [Accompanying H.R. 11157], p. 39 at p. 42.

[38]Mansfield, *The Albertson Case: Conflict between the Privilege Against Self-Incrimination and the Government's Need for Information,* 1966 Sup. Ct. Rev. 103, 165.

7. Use-Immunity Cannot Be Co-Extensive With the Protection Afforded by the Fifth Amendment Privilege Because Dependent for Its Implementation Upon Rules Which Would, in Effect, Permit Conviction of the Accused Based on Evidence From His Own Mouth.

The Fifth Amendment Privilege against Self-Incrimination, perforce its history and its terms, was aimed at preventing government from *compelling* testimony, never with safeguarding its fruits from future use in criminal cases. Only after the right of silence had been established,[39] *Brown,* and later *Ullman,* conceived its object as protecting a witness from being "brought by means of his own evidence within the penalties of the law."[40] But transaction immunity, it is clear, was deemed the minimum constitutionally acceptable consideration for a witness's testimony. While *Brown* refused to extend *Counselman,* neither *Brown,* nor any case since has rejected its holding that use-immunity was not an adequate substitute for the Privilege.[41]

After all, if immunity is to be thrust upon an unwilling witness in exchange for his testimony, the government must compensate him justly for loss of his constitutional right of silence.

It is not enough for government to seize his testimony and promise never to use it against him. For such

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[39]"A history of immunity acts . . . shows such acts began almost as soon as the right of silence established itself." Rogge, *Compelling the Testimony of Political Deviants,* 55 Mich. L. R. 375, 383 (1955).

[40]*Brown v. Walker, supra,* 161 U.S. at p. 600, quoting with approval *Reg. v. Boyes,* 1 Best and S. 311, at p. 321. See also, *Brown,* at pp. 605-606; *Ullman v. United States, supra,* 350 U.S. at p. 439.

[41]Not even *Murphy v. Waterfront Commission of New York Harbor, supra,* 378 U.S. 52, although the immunity law there in question was transactional.

a promise must inevitably be broken to the hope because dependent on rules which render possible—even probable—the conviction of a use-immunity witness on evidence derived from his mouth.

This Court has already intimated that the exclusionary rules applicable to illegally obtained evidence are relevant to the immunity field. (*United States v. Blue,* 384 U.S. 251, 255 (1966); *Murphy v. Waterfront Commission of New York Harbor, supra,* 378 U.S. at p. 79, n. 18).

Although exclusionary rules are fashioned to deter future violations of constitutional rights (See: *Elkins v. United States,* 364 U.S. 206, 217 (1960), "exceptions" have crept into them which, applied to the use-immunity field only further erodes the Privilege, and even repudiates the committment of use-immunity and the intent of its proponents.

California, for example, holds that the fruits of an *involuntary confession* are not excludable if they *would have been* discovered by police from information already in their possession or independently acquired (*People v. Ditson,* 57 Cal. 415, 20 Cal. Rptr. 165 (1962) (cert. denied); *People v. Chapman,* 261 Cal. App. 2d 149, 67 Cal. Rptr. 601, 613 (1968); *People v. Carlin,* 261 Cal. App. 2d 30, 67 Cal. Rptr. 557, 561 (1968)).

A similar rationale was applied to an illegal entry in *Wayne v. United States,* 318 F. 2d 205, at p. 209 (1963), where the court concluded that because the evidence [*i.e.,* the corpus] would sooner or later have been discovered [albeit not necessarily in the defendant's home] "the necessary causal relation between the illegal activity and the evidence sought to be excluded is lacking in this case." (p. 209).

The beginnings of that formulation may be seen in *United States v. DeLorenzo, supra,* 151 F. 2d 122, where the court refused to reverse a conviction resting on testimony given before a Congressional Committee under transactional immunity on the ground that the facts testified to, and used against the appellant in his trial, were known to the chairman before disclosure (See also: *Cohen v. United States,* 201 F. 2d 386, 391 (C.A. 9, 1953)).

Nardone v. United States, 308 U.S. 338, 341 (1939) and *Wong Sun v. United States,* 371 U.S. 471, 487-488 (1963). established another "exception" whereby evidence derived from illegal police conduct may be nevertheless admissible where the taint is *attenuated.*

Nardone went so far as to require proof "that a *substantial* portion of the case against [the defendant] was a fruit of a poisonous tree" (p. 342).

The *Nardone* exceptions appear to have been anticipated by *Heike v. United States,* 227 U.S. at p. 144. There, the Court suggested that immunity from prosecution was available only if there was *substantial* prior testimony on the subject for which he is subsequently prosecuted (See also: *United States v. Lumber Products Assn., Inc., supra,* 42 F. Supp. at 915).

Again, where transactional immunity cases involve solely questions of law, which may ordinarily be resolved by reference to a transcript of the immunity proceeding, the critical question in use-immunity cases is one of fact, namely, whether evidence used against the witness was derived from independent sources.

The difficulty thus imposed on a witness-accused to disprove the government's contention is obvious. Nor is it made easier by procedural rules which deny him

access to investigation reports, statements of witnesses and other government records which may shed light on the question (See: Rule 16, Rules of Criminal Procedure, Title 18, U.S.C.; 18 U.S.C. §3500).

Moreover, the government's claim of independently acquired evidence will usually turn on the credibility of its witnesses, probably for the most part, law enforcement personnel. A finding in favor of the government on this or any other issue of fact, where there is evidence to support it, is, of course, binding on a reviewing court (See: *Rogers v. Richmond, supra,* 365 U.S. at p. 546; *Lisenba v. California,* 314 U.S. 219, 239).

True, it is not unusual for constitutional claims to rest on fact questions. However, the issue here is whether use-immunity is co-extensive with the Fifth Amendment Privilege, which provides absolute protection from the use of incriminating evidence against the witness furnishing it. Theoretically, transactional immunity grants equivalent protection by barring prosecution based on tainted evidence, and providing an avenue of appeal for the enforcement of this protection.

But use-immunity makes no such claim, because the possibility of absolute protection, even theoretically, is too remote. Decisions which turn on fact questions are too susceptible of human error to allow the constitutional protection hinging on it to be characterized as absolute.

8 Concluding Statement.

What emerges from the application of use-immunity is that the witness is heavily, if not entirely, dependent on the honesty and good faith of government officials, which, it has been said, poses no hazard to his rights.[42]

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[42]Mr. Justice White, concurring, *Murphy v. Waterfront Commission of New York Harbor, supra,* 378 U.S. at pp. 103-104.

Such an inference seems irrelevant in an adversary system, and in any event, is inconsistent with judicial experience which has found it necessary to exclude evidence to deter police lawlessness (*Mapp v. Ohio, supra,* 367 U.S. 643; *Rogers v. Richmond,* 365 U.S. 534 (1961); *Nardone v. United States, supra,* 308 U.S. 338), as well as to correct injustice caused by overzealous prosecutors (See: *Communist Party v. Subversive Activities Control Board,* 351 U.S. 115; and *Measosh v. United States,* 352 U.S. 1 (1956) [use of perjured testimony]; *Mooney v. Holohan,* 294 U.S. 103 (1935); *Brady v. Maryland,* 373 U.S. 83, 86-87 (1963), and cases cited thereat [non-disclosure of perjured or framed evidence]; *Berger v. United States,* 295 U.S. 78 (1934) [improper argument by prosecutor]).

In the final analysis, one has to ask why the government should seek to compel testimony, and then prosecute for the offense concerning which such testimony was elicited? If the evidence he gives cannot be used against the witness, at least theoretically, why compel his testimony, and then, as here, prosecute?

Agreed, a criminal should not be allowed to escape punishment for his wrongdoing. But if that is the answer offered, it only begs the question. The desire to punish, to bring to brook, should not be confused with compelling confessions which, after all, is what the Privilege is supposed to prevent.

It would seem more appropriate to put government to its choice: Either prosecute, and forego the accused's testimony, or compel it, and forego prosecution (Semble: *Rosiaro v. United States,* 353 U.S. 53, at pp. 61, 65, n. 15 (1957); *United States v. Coplan,* 185 F. 2d

629, 636-639 (C.A. 2, 1950); *United States v. Andolschek*, 142 F. 2d 503, 505 (C.A. 2, 1944)).

The statute at bar imposes no such election on the government; contrarily, under its aegis, government gets much, and gives up little.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgments of the Courts below should be reversed.

Respectfully submitted,

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